

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 12-0649 CW

Plaintiff,

v.

ORDER DENYING
§ 2255 MOTION

DEANDRE SNEAD,

Defendant.

_____/

Movant Deandre Snead, represented by counsel, moves under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Respondent has filed an opposition to the motion and Movant has filed a reply.¹ Having considered all of the papers filed by the parties and the record in this case, the Court DENIES the motion.

BACKGROUND

A. Procedural Background

On December 10, 2012, Movant plead guilty, without a plea agreement, to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Applying United States Sentencing Guideline (USSG) § 2K2.1(a)(4)(a), the Presentence Report (PSR) indicated that Movant's base offense

¹ The government has filed a motion to stay the proceedings related to this motion pending the resolution of Beckles v. United States, Supreme Court Case No. 15-8544, in which the Supreme Court will address the applicability of Johnson v. United States, 135 S. Ct. 2551 (2015) to the United States Sentencing Guidelines. Movant opposes the motion to stay. As discussed herein, the Court denies the § 2255 motion regardless of whether Johnson applies retroactively to the Sentencing Guidelines. Accordingly, the motion to stay is DENIED. Docket No. 36.

1 level was 20, because Movant had one prior conviction for a crime
2 of violence, second degree burglary. Section 2K2.1(a)(4)(a)
3 relies on the Career Offender Guideline, USSG § 4B1.2, for the
4 definition of crime of violence. The PSR applied a four-level
5 enhancement because the offense involved a firearm with an
6 obliterated serial number and a three-level downward adjustment
7 for acceptance of responsibility, for a total offense level of 21.
8 The PSR indicated that Movant should be classified in Criminal
9 History Category V, resulting in an advisory Guidelines range of
10 seventy to eighty-seven months. If Movant's sentence had not been
11 enhanced based on the crime of violence, his total offense level
12 would have been 15, with a resulting advisory Guidelines range of
13 thirty-seven to forty-six months.

14 At sentencing, the Court found that Movant's advisory
15 Guidelines range was seventy to eighty-seven months and sentenced
16 him to sixty months of imprisonment. Movant did not file a direct
17 appeal but, on May 31, 2016, after the Supreme Court issued its
18 decision in Johnson v. United States, 135 S. Ct. 2551 (2015), he
19 filed the instant § 2255 motion.

20 B. Johnson v. United States

21 In Johnson, the Supreme Court addressed a challenge to the
22 residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C.
23 § 924(e), which provides that a defendant with three prior
24 "violent felony" convictions faces a fifteen-year mandatory-
25 minimum sentence if convicted of violating 18 U.S.C. § 922(g). 18
26 U.S.C. § 924(e). The ACCA residual clause definition of "violent
27 felony," which encompasses any crime that "involves conduct that
28 presents a serious potential risk of physical injury to another,"

1 is identical to the residual clause of the Guidelines' definition
2 "crime of violence." The Ninth Circuit makes "no distinction
3 between the terms 'violent felony' as defined in the ACCA and
4 'crime of violence' as defined in § 4B1.2(a)(2) of the Sentencing
5 Guidelines for purposes of interpreting the residual clauses."
6 United States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013)
7 (quoting United States v. Crews, 621 F.3d 849, 852 n.4 (9th Cir.
8 2010) (internal alteration marks omitted)).

9 The Johnson Court held that the residual clause is so vague
10 that it "both denies fair notice to defendants and invites
11 arbitrary enforcement by judges." 135 S. Ct. at 2557.
12 Accordingly, the Johnson Court held that an increase to a
13 defendant's sentence under the clause "denies due process of law."
14 In Welch v. United States, 136 S. Ct. 1357 (2016), the Supreme
15 Court held that Johnson is retroactive as applied to the ACCA.
16 However, neither the Supreme Court nor the Ninth Circuit has
17 addressed whether Johnson is retroactive as to the identical
18 language in the Sentencing Guidelines.

19 LEGAL STANDARD

20 A prisoner in custody under sentence of a federal court,
21 making a collateral attack against the validity of his or her
22 conviction or sentence, must do so by way of a motion to vacate,
23 set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in
24 the court which imposed the sentence. Tripati v. Henman, 843 F.2d
25 1160, 1162 (9th Cir. 1988). Section 2255 was intended to
26 alleviate the burden of habeas corpus petitions filed by federal
27 prisoners in the district of confinement by providing an equally
28 broad remedy in the more convenient jurisdiction of the sentencing

1 court. United States v. Addonizio, 442 U.S. 178, 185 (1979).
2 Under 28 U.S.C. § 2255, a federal sentencing court may grant
3 relief if it concludes that a prisoner in custody was sentenced in
4 violation of the Constitution or laws of the United States.

5 DISCUSSION

6 The government agrees that Johnson applies to the Sentencing
7 Guidelines. However, the government argues that Movant
8 procedurally defaulted his claim under Johnson by failing to file
9 a direct appeal and that Johnson's application to the Sentencing
10 Guidelines is not retroactive. Moreover, the government argues
11 that Movant's prior conviction for second-degree robbery is a
12 crime of violence, as defined by the Guidelines, even without the
13 residual clause.

14 I. Procedural Default

15 As a general rule, "claims not raised on direct appeal may not
16 be raised on collateral review unless the petitioner shows cause
17 and prejudice." Massaro v. United States, 538 U.S. 500, 504
18 (2003). In order to overcome this procedural default resulting
19 from the failure to raise his claims on direct appeal, Movant must
20 show cause for the default and actual prejudice, or actual
21 innocence. Sanchez-Llamas v. Oregon, 548 U.S. 331, 350-51 (2006).
22 A movant shows cause by demonstrating "that the procedural default
23 is due to an 'objective factor' that is 'external' to the
24 petitioner and that 'cannot be fairly attributed to him.'" Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir. 2000) (quoting
25 Coleman v. Thompson, 501 U.S. 722, 731-32 (1991)).
26

27 The government argues that "a defendant who failed to raise a
28 claim on direct appeal must show ineffective assistance of counsel

1 to establish cause." Docket No. 35 at 4. This narrow
2 interpretation of cause is not supported by case law. Although,
3 in most cases, a failure to object or failure to file a direct
4 appeal that is not attributable to ineffective assistance of
5 counsel is a procedural default, there are circumstances in which
6 cause may be found. See, e.g., Reed v. Ross, 468 U.S. 1, 13
7 (1984) ("Underlying the concept of cause, however, is at least the
8 [] notion that, absent exceptional circumstances, a defendant is
9 bound by the tactical decisions of competent counsel.") The
10 Supreme Court has held that cause is found when "the factual or
11 legal basis for a claim was not reasonably available to counsel"
12 at the time a direct appeal was or could have been filed. Murray
13 v. Carrier, 477 U.S. 478, 488 (1986). Accordingly, the failure to
14 file a direct appeal when the appeal "would have been futile,
15 because a solid wall of circuit authority" precluded the appeal
16 does not constitute procedural default. English v. United States,
17 42 F.3d 473, 479 (9th Cir. 1994) (internal quotation marks and
18 citations omitted); see also Kimes v. United States, 939 F.2d 776,
19 778 (1991) ("failure to object . . . is not fatal to [a § 2255]
20 petition, since well settled law precluded [the] claim at the
21 time").

22 In Reed, the Supreme Court held that when one of its
23 decisions explicitly overrules one of its prior decisions or
24 overturns "a longstanding and widespread practice to which [the
25 Supreme Court] has not spoken, but which a near unanimous body of
26 lower court authority has expressly approved" and the new decision
27 is given retroactive application, there will almost
28 certainly have been no reasonable basis upon which an
attorney previously could have urged a []court to adopt

1 the position that this Court had ultimately adopted.
2 Consequently, the failure of a defendant's attorney to
3 have pressed such a claim . . . is sufficiently
4 excusable to satisfy the cause requirement.

5 Id. at 17 (internal quotation marks omitted). Here, Johnson
6 expressly overrules prior Supreme Court cases upholding the
7 analogous residual clause in the ACCA and the Supreme Court has
8 held that Johnson is retroactive with respect to ACCA claims.
9 Welch v. United States, 136 S. Ct. 1257 (2016).

10 Moreover, it is indisputable that, at the time Movant could
11 have filed a direct appeal, a claim that the residual clause in
12 the § 4B1.2 definition of crime of violence was void for vagueness
13 would not have succeeded and that "the legal basis for the claim
14 was not reasonably available to counsel" at that time. Murray,
15 477 U.S. at 488. Vagueness challenges to the residual clauses in
16 the ACCA and the Sentencing Guidelines were foreclosed by the
17 Supreme Court decisions in James v. United States, 550 U.S. 192
18 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011).
19 Accordingly, Movant has demonstrated cause for his procedural
20 default.

21 As stated above, Movant must also demonstrate prejudice by
22 showing that the alleged error "worked to his actual and
23 substantial disadvantage, infecting his entire trial with error of
24 constitutional dimensions.'" United States v. Braswell, 501 F.3d
25 1147, 1150 (9th Cir. 2007) (quoting United States v. Frady, 456
26 U.S. 152, 170 (1982)). The Supreme Court has not defined the
27 level of prejudice necessary to overcome procedural default but it
28 has held that the level is "significantly greater than that
necessary under the more vague inquiry suggested by the words

1 'plain error.'" Murray, 477 U.S. at 493-94 (quoting Engle v.
2 Isaac, 456 U.S. 107, 135 (1982)). To show prejudice under the
3 plain error standard, a defendant must "show her substantial
4 rights were affected, and to do so, must establish that the
5 probability of a different result is sufficient to undermine
6 confidence in the outcome of the proceeding." United States v.
7 Bonilla-Guizar, 729 F.3d 1179, 1187 (9th Cir. 2013) (internal
8 quotation marks omitted).

9 The government argues that Movant cannot demonstrate
10 prejudice because the Sentencing Guidelines are only advisory.
11 Accordingly, the government notes that this Court "had nearly
12 unfettered discretion to impose any sentence that Congress made
13 applicable to his offense." Docket No. 35 at 6. However, even
14 though the Guidelines are advisory, the Supreme Court has
15 consistently held that sentencing courts "must treat the
16 Guidelines as 'the starting point and the initial benchmark.'" Kim
17 brough v. United States, 552 U.S. 85, 108 (2007) (quoting Gall
18 v. United States, 552 U.S. 38, 49 (2007); see also Peugh v. United
19 States, 133 S. Ct. 2072, 2083 (2013) ("federal sentencing scheme
20 aims to achieve uniformity by ensuring that sentencing decisions
21 are anchored by the Guidelines"); Gall, 552 U.S. at 50 n.6
22 ("district courts must begin their analysis with the Guidelines
23 and remain cognizant of them throughout the sentencing process.")).
24 The Supreme Court recently observed that "when a Guidelines range
25 moves up or down, offenders' sentences move with it." Peugh, 133
26 S. Ct. at 2084. An improperly calculated Guidelines range would
27 "derail[] the sentencing proceeding before it even began." United
28 States v. Doe, 705 F.3d 1134, 1154 (9th Cir. 2013).

1 Accordingly, the Ninth Circuit has long held that, on direct
2 review, miscalculation of the Guidelines range constitutes plain
3 error that affects a defendant's substantial rights. See, e.g.,
4 id. at 1188 ("We have held that when a sentencing judge
5 incorrectly calculates the Guidelines range, potentially resulting
6 in the imposition of a greater sentence, the error affects the
7 defendant's substantial rights and the fairness of the judicial
8 proceedings."). Moreover, the Supreme Court recently held that,
9 absent "unusual circumstances," when a sentencing court improperly
10 calculates the Guidelines range, the sentence constitutes plain
11 error, even if the sentence imposed is within the correct
12 Guidelines range. Molina-Martinez v. United States, 136 S. Ct.
13 1338, 1347 (2016).

14 Here, this Court considered the enhancement based on the
15 definition of crime of violence in imposing its sentence. Even
16 though the sentence of sixty months was a downward variance from
17 the enhanced range of seventy to eighty-seven months, it was still
18 well above the non-enhanced range of thirty-seven to forty-six
19 months. The Court finds that the constitutional error in
20 calculating Movant's Guidelines range "worked to his actual and
21 substantial disadvantage." Fraday, 456 U.S. at 171 (emphasis in
22 original).

23 Accordingly, the Court finds that Movant has shown cause and
24 prejudice sufficient to overcome his failure to file a direct
25 appeal challenging his sentence.

26 II. Retroactivity

27 The government next argues that, under Teague v. Lane, 489
28 U.S. 288 (1989), Johnson does not apply retroactively to cases in

1 which an enhancement based on the definition of crime of violence
2 in the Career Offender Guideline was applied. In Teague, the
3 Supreme Court held that newly announced constitutional rules apply
4 to all criminal cases still on direct review but only apply
5 retroactively on collateral review if the rule (1) "places certain
6 kinds of primary, private individual conduct beyond the power of
7 the criminal law-making authority to proscribe" or (2) is a
8 "watershed rule[] of criminal procedure." Id. at 304, 311
9 (internal quotation marks omitted).

10 As stated above, the Supreme Court has held that Johnson is a
11 new substantive rule because it "changed the substantive reach of
12 the Armed Career Criminal Act, altering 'the range of conduct or
13 the class of persons that the [Act] punishes.'" Welch, 136 S. Ct.
14 at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).
15 Movant argues that, because the decision in Johnson similarly
16 limits the application of certain Guidelines provisions and
17 because it has been found to be retroactive with respect to the
18 ACCA, it should be retroactive as to those Guidelines provisions
19 as well. Movant contends that the retroactivity analysis in Welch
20 applies to the rule set out in Johnson, and does not depend on the
21 type of case in which the rule is applied.

22 It is true that the rule announced in Johnson applies only by
23 analogy to the definition of crime of violence in the Career
24 Offender Guideline. Johnson found that the language in the ACCA
25 is unconstitutionally vague. While courts, including the Supreme
26 Court and the Ninth Circuit, routinely look to interpretation of
27 language in the ACCA when considering nearly identical language in
28 the Guidelines and vice versa, it cannot be assumed that a finding

1 that Johnson is retroactive as to the ACCA definitively means that
2 it is retroactive as to the Guidelines. Indeed, the Supreme Court
3 recently granted certiorari in Beckles v. United States, 2016 U.S.
4 LEXIS 4142. Among the issues presented in Beckles is whether
5 Johnson applies retroactively to collateral challenges to federal
6 sentences enhanced based on the definition of crime of violence in
7 the Career Offender Guideline.

8 As the government points out, those who meet the criteria of
9 the ACCA are subject to a statutory mandatory minimum sentence.
10 In contrast, those who are eligible for enhancements under the
11 Sentencing Guidelines pursuant to language similar to that found
12 unconstitutional in Johnson are subject to higher advisory
13 Guidelines ranges. Therefore, the government argues that, as
14 applied to defendants who are challenging Guidelines enhancements,
15 the rule in Johnson is procedural because it "does not alter the
16 statutory sentencing range or prevent reimposition of the same
17 sentence without the career offender enhancement." Docket No. 55
18 at 10. In effect, the government argues that any new
19 constitutional rules applicable to Guidelines calculations are
20 neither substantive nor watershed procedural rules under Teague
21 and thus cannot be applied retroactively.² As a district court in
22 the District of Oregon recently observed, there is no Ninth
23
24

25 ² The government also argues that any Guidelines calculation
26 error is a "procedural error" rather than "substantive error."
27 However, the terms "procedural error" and "substantive error" are
28 terms of art related to direct appellate review of sentences and
are not applicable here. See Gall v. United States, 522 U.S. 38,
51 (2007).

1 Circuit or Supreme Court authority to support this position. See
2 United States v. Dean, 2016 WL 1060229, at *13 (D. Or.).

3 Indeed, in Reina-Rodriguez v. United States, the Ninth
4 Circuit determined that an en banc decision which "altered the
5 conduct that substantively qualifies as burglary under the
6 categorical approach" for purposes of the ACCA was a substantive
7 rule and therefore eligible for retroactive application under
8 Teague. 655 F.3d 1182, 1189 (9th Cir. 2011). Without addressing
9 whether the retroactivity analysis should be different for cases
10 under the Guidelines as opposed to under the ACCA, the Ninth
11 Circuit applied the decision retroactively to a case challenging a
12 Guidelines enhancement based on the § 4B1.2 definition of crime of
13 violence. Id. at 1189-90.

14 Moreover, in Welch, the Supreme Court made clear that it
15 "determine[s] whether a new rule is substantive or procedural by
16 considering the function of the rule." 136 S. Ct. at 1265. The
17 Welch Court held that rule in Johnson was substantive because it
18 "affected the reach of the underlying statute rather than the
19 judicial procedures by which the statute is applied." Id.
20 Applying Johnson to the Guidelines likewise affects the reach of
21 those Guidelines that rely on the definition of crime of violence
22 in the Career Offender Guideline but "has nothing to do with the
23 range of permissible methods a court might use to determine"
24 whether those Guidelines apply. Id. As it does for the ACCA,
25 "Johnson substantively changes the conduct by which federal courts
26 may enhance the sentence of a defendant under the Guidelines."
27 Dean, 2016 WL 1060229, at *16. Accordingly, Johnson applies
28 retroactively to Movant's case.

1 III. Crime of Violence

2 Finally, the government argues that Movant's conviction for
3 second-degree robbery, in violation of California Penal Code
4 section 211, qualifies as a crime of violence, as defined by the
5 Career Offender Guideline, without relying on the residual clause.

6 Section 4B1.2 defines a crime of violence as

7 any offense under federal or state law, punishable by
8 imprisonment for a term exceeding one year, that--

9 (1) has as an element the use, attempted use, or
10 threatened use of physical force against the person of
11 another, or

12 (2) is burglary of a dwelling, arson, or extortion,
13 involves use of explosives, or otherwise involves
14 conduct that presents a serious potential risk of
15 physical injury to another.

16 USSG § 4B1.2(a). The underlined portion of the definition is
17 referred to as the residual clause. Application Note 1 to § 4B1.2
18 indicates that the term "crime of violence" "includes murder,
19 manslaughter, kidnapping, aggravated assault, forcible sex
20 offenses, robbery, arson, extortion, extortionate extension of
21 credit, and burglary of a dwelling." USSG § 4B1.2, comment.
22 (n.1).

23 As the government points out, the Ninth Circuit has
24 previously held that violations of California Penal Code section
25 211 are crimes of violence for purposes of USSG § 2L1.2. See
26 United States v. Flores-Mejia, 687 F.3d 1213, 1215-16 (9th Cir.
27 2012); United States v. Becerril-Lopez, 541 F.3d 881, 892-93 (9th
28 Cir. 2008). In those cases, the Ninth Circuit held, "CPC § 211 is
categorically a 'crime of violence' under U.S.S.G. § 2L1.2,
because, in all its applications, CPC § 211 always constitutes

1 either generic robbery or generic extortion, both of which are
2 included in U.S.S.G. § 2L1.2's definition of 'crime of violence.'
3 United States v. Dixon, 805 F.3d 1193, 1196 (9th Cir. 2015).

4 Unlike § 4B1.2, § 2L1.2 does not contain a residual clause,
5 nor does the Guideline itself include a definition of crime of
6 violence. Instead, an application note to the Guideline defines
7 crime of violence to be any of a list of enumerated generic
8 offenses, including robbery and extortion, or any offense that
9 "has as an element the use, attempted use, or threatened use of
10 physical force against the person of another." USSG § 2L1.2,
11 comment. (n.1(b)(iii)).

12 As noted above, the § 4B1.2 Guideline definition of crime of
13 violence at issue in this case includes extortion, but not
14 robbery, in its list of enumerated generic crimes. The commentary
15 to § 4B1.2 includes robbery in an additional list of enumerated
16 generic crimes. Citing Stinson v. United States, 508 U.S. 36, 38
17 (1993), the government argues that Guidelines commentary,
18 including the list of enumerated generic crimes in the commentary
19 to § 4B1.2, is binding on this Court. Movant counters that
20 Guidelines commentary is not binding if "it violates the
21 Constitution or a federal statute, or is inconsistent with, or a
22 plainly erroneous reading of, that guideline." Id. Movant
23 further contends that, without the residual clause, generic
24 robbery no longer constitutes a crime of violence under § 4B1.2.
25 Therefore, according to Movant, the commentary including robbery
26 either violates the Constitution because it relies on the residual
27 clause or is inconsistent with the Guideline without the residual
28 clause. However, in the Ninth Circuit, generic robbery is defined

1 as "aggravated larceny, containing at least the elements of
2 misappropriation of property under circumstances involving
3 immediate danger to the person." United States v. Becerril-Lopez,
4 541 F.3d 881, 891 (9th Cir. 2008) (quoting 3 W. LaFave,
5 Substantive Criminal Law § 20.3(e) (2d ed. 2003)). This
6 definition meets the "elements clause" of § 4B1.2(a), because it
7 "has as an element the . . . threatened use of physical force
8 against the person of another." USSG § 4B1.2(a); see also, id.
9 (noting that the generic definition of robbery requires that the
10 taking be done by means of violence or the use of force or fear).
11 Accordingly, the inclusion of robbery in the Guidelines commentary
12 is binding on this Court.³

13 Because § 4B1.2's definition of crime of violence encompasses
14 both generic robbery and generic extortion and because the Ninth
15 Circuit has held that California Penal Code section 211 always
16 constitutes either generic robbery or generic extortion, Movant's
17 conviction under section 211 continues to qualify as a crime of
18 violence following Johnson.

19 IV. Request for a Certificate of Appealability

20 If the Court denies Movant's § 2255 motion as it does here,
21 Movant requests a certificate of appealability (COA) pursuant to

22 ³ Movant's citation to United States v. Soto-Rivera, 811 F.3d
23 53 (1st Cir. 2016), is unavailing. In Soto-Rivera, the First
24 Circuit held that, after Johnson, the inclusion of possession of a
25 machine gun as a crime of violence in the commentary to § 4B1.2(a)
26 was improper because, "in the absence of the residual clause,
27 there is nothing within § 4B1.2(a)'s text to serve as an anchor
28 for Application Note 1's inclusion of possession of a machinegun
within the definition of crime of violence." Id. at 60. In
contrast, as discussed above, generic robbery qualifies as a crime
of violence under the "elements clause."

1 28 U.S.C. § 2253(c). A certificate of appealability should be
2 granted "only if the applicant has made a substantial showing of
3 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).⁴
4 The Court certifies in accordance with 28 U.S.C. § 2253 that, for
5 the reasons set forth in the Order Denying § 2255 Motion, none of
6 the issues raised in the motion involves a substantial showing of
7 the denial of a constitutional right. The certificate of
8 appealability is denied.

9 CONCLUSION

10 For the foregoing reasons, the Court DENIES Movant's § 2255
11 motion. Docket No. 27.

12
13 IT IS SO ORDERED.

14
15 Dated: August 2, 2016



16 CLAUDIA WILKEN
17 United States District Judge
18
19
20
21

22
23 ⁴ Section 2253(c)(2) codified the standard announced by the
24 United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880,
25 892-93 (1983). In Barefoot, the Court explained that "a
26 substantial showing of the denial of [a] federal right" means that
27 a petitioner "must demonstrate that the issues are debatable among
28 jurists of reason; that a court could resolve the issues [in a
different manner], or that the questions are adequate to deserve
encouragement to proceed further." Id. at 893 n.4.